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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 390.

R. W. FRAZIER and A. WERTHEIMER, As Receivers of 8701 Collins Avenue, Inc., Alleged Bankrupt,
Petitioners,

vs.

HARRISON O. ASH,
Respondent.

BRIEF OF RESPONDENT, HARRISON O. ASH, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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As will be developed, the petition almost completely ignores the provisions and requirements of Rule 23 of this Court.

OPINIONS BELOW.

The petition does not state whether the opinions of the Referee and the District Judge, or either, are reported or unreported, does not attach copies as appendices, and does not refer to any page or pages of the record at which they appear.

JURISDICTION.

The petition says:

> "The statute or rule under which this Court has jurisdiction is under Rule 19 of the Supreme Court of the United States Rules, paragraph 1, sub-paragraph b." (Petition, page 3.)

The date of the judgment of the Court of Appeals is not stated in the petition nor, for that matter, is there any mention of a judgment. There is no citation of or reference to any statute believed to confer jurisdiction on this Court.

QUESTIONS PRESENTED.

The petition does not state any question presented for review.

STATUTES INVOLVED.

The petition does not cite, refer to, or set forth any statute involved, nor does it have an appendix setting forth any statute.

STATEMENT.

There being no statement of any question presented, the petition (necessarily and actually) is devoid of any "statement of the case containing the facts material to the consideration of the questions presented." At page 5, the petition merely says:

> "The facts of the case are ably stated in the printed records, which are filed simultaneously with the filing

of this Petition for Writ of Certiorari, beginning at page 276 of the printed record."

PETITIONER'S REASONS FOR GRANTING WRIT.

The petition says (page 2):

> "The grounds upon which your petitioners seek to invoke the jurisdiction of the Supreme Court of the United States are based upon the fact that there is a provision under Rule 19(1)(b) in that the Opinion of the United States District (*sic*) Court of Appeals, Fifth Circuit, in said case is in conflict with the decision of another Court of Appeal on the same matter and has decided a Federal question in a way in conflict with the applicable decision of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

No *conflicting* decision of any other Court of Appeals is cited or referred to.

One of the Court of Appeals decisions cited is *In re Childs Co. Brodsky* v. *Finn*, (C. C. A. 2) 163 F. 2d 379. The Court below, in the instant case, said:

> "We agree with the Receivers that much of the opinion in the Childs Co. case has no relation to the problem before us. However, it does furnish a precedent for the doctrine that an obligation incurred by a bid and its acceptance at a bankruptcy sale may under some circumstances be discharged by the liability being shifted to or assumed by another. Such doctrine we think is sound and its application here is proper." (Page 14, copy of printed opinion attached to petition.)

As for the other Court of Appeals decision cited, viz., *Gordon* v. *Woods*, (C. C. A. 1) 189 F. 2d 76, 202 F. 2d 476, the first opinion held that a defaulting bidder at a bankruptcy

sale can be compelled by summary proceedings to perform his bid or respond in damages. The Court below, in the instant case, said:

> "The power of the bankruptcy court to adjudicate the liability of a bidder at a referee's sale in a summary proceeding is well settled." (Page 10, copy of printed opinion attached to petition.)

The second opinion in *Gordon* merely held that such a bidder "was liable for loss sustained in operating realty of bankrupt prior to resale, but that [he] was not liable for attorney's fees in connection with litigation." (Syllabus).

The instant case did not even remotely involve such items.

The only cited decision of this Court is *Metcalf* v. *Williams*, 104 U. S. 93, S. Ct., 14 Otto 93, *26* L. Ed. 665, with which the ruling of the Court below is implied to be in conflict. In that case this Court held that the rule of *descriptio personae* yields to the manifest *intent* of the parties. The Court below, in the instant case, said:

> "No inference seems tenable except the one which the district judge must have drawn, that the Receivers and the Referee, as well as Ash, did not *intend* that Ash should be personally charged with liability on an obligation which he obviously was not incurring on his own behalf." (Page 12, of copy of printed opinion attached to petition.) [Emphasis supplied.]

CONCLUSION.

The petition calls for application of Rule 23(4):

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requir-

ing consideration will be a sufficient reason for denying his petition."

If, notwithstanding its patent deficiencies, there may be gleaned from the petition some inkling of the "points requiring consideration," it is perfectly apparent that a negative should be inserted (as indicated) in the following excerpt from page 2 of the petition:

> "... the Opinion of the United States District (*sic*) Court of Appeals, Fifth Circuit, in said case is [not] in conflict with the decision of another Court of Appeal on the same matter and has [not] decided a Federal question in a way in conflict with the applicable decision of this Court ..."

The assertions of conflicts where none exist are followed by the charge that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

For support of that proposition (beyond the mere lifting of the quoted language from Rule 19), one searches the petition in vain.

The petition should be denied.

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